

**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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JOSEPH E. LANDA, II, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF MILITARY APPEALS*

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**BRIEF FOR THE UNITED STATES  
IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether petitioner was denied a fair trial because of actions taken by the government toward a government witness in this case.



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### **OPINIONS BELOW**

The opinion of the Air Force Court of Military Review (Pet. App. 1a-4a) is unreported. The opinion of the Court of Military Appeals (Pet. App. 5a) is not yet officially reported.

### **JURISDICTION**

The judgment of the Court of Military Appeals was entered on September 29, 1990. The petition for a writ of certiorari was filed on December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

### **STATEMENT**

Following a general court-martial before a military judge at Norton Air Force Base in California, petitioner, a

member of the United States Air Force, was convicted of the wrongful use of methamphetamine and the wrongful distribution of methamphetamine, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. Petitioner was sentenced to confinement for 18 months, a bad conduct discharge, forfeiture of all pay and allowances, and a reduction to the lowest enlisted grade. The convening authority approved the findings and the sentence. The Air Force Court of Military Review affirmed the findings and the sentence. On discretionary review, the Court of Military Appeals affirmed.

1. The evidence at trial showed that petitioner repeatedly used and distributed methamphetamine. Three witnesses testified against petitioner. Airman William Gibson testified in detail that he had seen petitioner use methamphetamine on three occasions and that he had twice bought methamphetamine from petitioner. Tr. 72-85. Airman Flint Cox testified that he had seen petitioner twice inhale methamphetamine and once inject it. Tr. 125-130. Cox also described how he and another airman had distributed methamphetamine to still another airman at petitioner's request, and how he had obtained methamphetamine from petitioner on two occasions. Tr. 131-133. Finally, Airman Eddie Corne testified that he had provided methamphetamine to petitioner on two occasions, and that he saw petitioner inhale methamphetamine both times. Tr. 108-112.

2. Petitioner's claim in this Court stems from the trial testimony of the government's three witnesses. On cross-examination of those witnesses, petitioner's counsel sought to prove that the witnesses were biased against petitioner and that the government had engaged in misconduct in the course of obtaining their testimony.<sup>1</sup>

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<sup>1</sup> For example, on cross-examination by defense counsel, Airman Gibson said that agents of the Air Force Office of Special Investigations

3. In the court of military review, petitioner argued that the government violated his due process rights by the manner in which it obtained Airman Cox's testimony. Petitioner claimed that OSI agents had not read to Cox a statement that Cox later swore to be true, and that Cox was warned that he would be court-martialed for perjury if his trial testimony differed from the description of the events that he gave to the OSI agents in a sworn statement. Assignment of Errors and Brief on Behalf of Accused 12-13 (Dec. 1, 1989). Petitioner also submitted an unsworn letter to the court from Airman Cox's father. Cox's father, who did not testify at petitioner's court-martial, indicated that his son had been threatened with an additional period of confinement if he did not testify against others who were involved in the use and distribution of methamphetamine.<sup>2</sup> Finally,

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(OSI) had told him that he would be in trouble if OSI ever found out that he was withholding information about people that he knew who were using drugs. Tr. 94. Gibson testified under a grant of use immunity, but he admitted that he did not want to testify, and he knew that if he did not, he would be violating an order to testify pursuant to the grant of use immunity. Tr. 95. Gibson understood, however, that his grant of immunity would not protect him against a perjury charge if he lied while testifying. Tr. 94. Airman Cox also testified under a grant of immunity after he had been convicted by a court-martial for the use of methamphetamine. Tr. 124. Cox received no reduction in his sentence as a result of his testimony in petitioner's case, and he was aware that his testimony could only be used against him if he lied while testifying. Tr. 124-125. On cross-examination by defense counsel, Cox indicated that he did not feel that OSI takes witness statements in a professional manner, but that he was not "twisting the truth" because of any pressure from OSI agents. Tr. 135, 139. Airman Corne also testified under a grant of immunity and indicated that he knew that he was required to tell the truth and that he would do so. Tr. 106.

<sup>2</sup> Airman Cox said nothing about any such threat during petitioner's court-martial. Cox also acknowledged that he could be court-martialed only if he lied while testifying under oath. Tr. 124-125.



petitioner submitted the unsworn statements of several other servicemen who had been convicted of drug offenses in unrelated proceedings and who offered vague and unsubstantiated allegations that the OSI had engaged in misconduct in connection with their own cases.

The court of military review rejected petitioner's claim and upheld his conviction. Pet. App. 1a-4a. The court explained that petitioner had a full opportunity on cross-examination to show that the government's witnesses should be discredited because of the OSI agents' allegedly improper conduct. *Id.* at 2a-3a.

4. The Court of Military Appeals summarily affirmed, citing its decision in *United States v. McCoy*, 31 M.J. 323 (C.M.A. 1990). Pet. App. 5a. *McCoy* held that the defendant was not denied a fair trial when investigating agents had improperly granted government witnesses informal use immunity. The court reasoned that the agents did not violate the defendant's own rights, and the defendant was able to reveal at trial that the witnesses may have been biased against him. 31 M.J. at 328-329.

#### ARGUMENT

Petitioner's sole claim is that he was denied a fair trial because of allegedly improper investigative techniques used by OSI agents. Petitioner, however, does not maintain that the OSI agents used any improper investigative technique against him. Instead, petitioner argues that OSI agents used improper investigative techniques to coerce the three witnesses at his trial to testify against him. That claim does not warrant review by this Court.

Petitioner has pointed to only two specific alleged improprieties on the part of the OSI. Petitioner says that

Airman Cox testified that the OSI agents did not properly administer the oath to Cox when the agents took a sworn statement from him. Pet. 3.<sup>3</sup> But Cox testified at trial that he was not "twisting the truth" because of any pressure from OSI agents. Tr. 139. Petitioner also claims that Cox was told that he would be prosecuted for perjury if his testimony at trial differed from his statement to the OSI agents. Pet. 3.<sup>4</sup> But since there is nothing improper about prosecuting a person for committing perjury while testifying under a grant of use immunity, see *United States v. Apfelbaum*, 445 U.S. 115 (1980), there also is nothing improper about warning an immunized witness that he is still subject to prosecution for perjury should he lie on the stand at trial. In any event, petitioner has presented his claims in the wrong forum. It is for the trier of fact, "not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story." *United States v. Bailey*, 444 U.S. 394, 414-415 (1980). See also *Hoffa v. United States*, 385 U.S. 293, 311 (1966) (rejecting the claim that the use of informants violates due process; "[t]he established safeguards of the Anglo-American legal system leave the veracity of

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<sup>3</sup> Cox testified as follows, Tr. 135:

Q. Do you feel that the OSI takes their statements in a professional manner?

A. No, ma'am, I don't.

Q. Is it a fact that on a statement you gave in January that when they swore you to it they just said, "raise your hand and," just said "blah, blah, blah, blah?"

A. That's fairly accurate.

<sup>4</sup> Cox testified as follows, Tr. 135:

Q. And you were told that if you didn't back up the statements that you gave to the OSI that you could be court-martialled [sic]?

A. Yes, ma'am.

a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.”).

Petitioner makes the general claim that the government’s witnesses were biased against him because they testified under a grant of use immunity or because they had been coerced into testifying against him. Petitioner, however, was able to present that defense at trial by attempting to persuade the trial judge, who was sitting as the trier of fact, that the government’s witnesses should not be believed, for a variety of reasons. As the court of military review pointed out, petitioner had a full opportunity to present his defense of unfair coercion and bias during cross-examination. Pet. App. 3a. Since petitioner had that opportunity at trial, his claim reduces to the argument that the government’s witnesses should not have been believed. That claim does not warrant review by this Court.

Petitioner argues that the military appellate courts erred in not ordering a hearing on his general claim of government misconduct once he submitted to the court of military review the unsworn statements of several other alleged victims of misconduct. Pet. 6. None of those four persons, however, testified at petitioner’s trial. Any misconduct with regard to them (even assuming that their allegations were true) therefore had no effect on petitioner’s trial. Moreover, in light of the vague and unsubstantiated nature of the allegations contained in those letters, the court of military review was entitled to treat the declarants’ claims with skepticism.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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